



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Superior Reporting Services, Inc.
File: B-230585
Date: June 16, 1988

DIGEST

1. Although the Administrative Office of the United States Courts, as an arm of the judicial branch, is not subject to the Federal Property and Administrative Services Act of 1949, as amended, or the Federal Acquisition Regulation, and its procurements for court reporting services are not subject to any procurement statute, General Accounting Office will consider protests of such procurements to determine whether the actions taken by the Administrative Office are reasonable.
2. Decision to award to offeror with more favorable recent performance record but slightly higher price was reasonable where request for proposals provided for evaluation of offers on the basis of price as well as other factors including experience.

DECISION

Superior Reporting Services, Inc. protests the Administrative Office of the United States Courts' failure to award it a contract under request for proposals (RFP) No. 113-88-01 for court reporter services for the United States Bankruptcy Court for the Northern District of Georgia. Superior contends that the solicitation contemplated the award of two contracts and that it, as one of the two low offerors, should have received an award. Superior also complains that the Administrative Office now intends to improperly modify the awardee's contract to double the number of judges for whom reporting services are to be provided. We deny the protest in part and dismiss it in part.

The RFP requested court reporting services on a requirements basis for three bankruptcy judges for a 3-year period (base

042491/136129

year plus 2 option years). Offerors were asked to furnish a daily rate, a half-day rate, and an overtime rate for each of the 3 years. The solicitation provided for the evaluation of offers on the basis of (1) price, (2) experience of the offeror and of the offeror's reporters, and (3) minimum notice period required by the offeror and the offeror's service commitment.

Three offerors responded to the RFP. Superior submitted the lowest evaluated price for the reporting services. Newberry & Company was second low, with, according to our calculations, a yearly evaluated price about \$30 higher than Superior's. Because the difference in price was slight (and the two offerors were indistinguishable on the basis of the third evaluation criterion), the contracting officer placed great weight on the court's recent experience with the two contractors in evaluating the offers. In Superior's case, complaints concerning the reliability of the firm's reporters had recently been received from the court, whereas no complaints concerning Newberry's performance had been received. The contracting officer therefore determined that superior's poor performance record outweighed its marginally lower price and selected Newberry for award.

Upon learning that Newberry had been awarded a contract, Superior complained to the Administrative Office that it had been its understanding that two awards, each for three judges, would be made under the solicitation since there were in fact six bankruptcy judges in the Northern District of Georgia. According to Superior, awards for the services have in the past always been divided between two contractors and it anticipated that the Administrative Office intended to make dual awards here. The Administrative Office reports that it was not until Superior lodged its complaint that it realized that there were six, rather than three, bankruptcy judges in the District and that it needed reporting services for the additional three judges. At this point, however, additional complaints concerning the reliability of Superior's reporters had been received, and the Administrative Office therefore did not regard Superior as a responsible source for the services. The contracting officer has indicated that he instead intends to modify Newberry's contract to increase the number of judges covered to six. The protester objects both to the original award to Newberry and to the Administrative Office's plan to increase the number of judges under Newberry's current contract.

As a preliminary matter, we agree with the Administrative Office that since it is an arm of the judicial branch, its procurements are not subject to the Federal Property and Administrative Services Act of 1949, as amended, or to the

Federal Acquisition Regulation. See Electrographic Corp.--Request for Reconsideration, B-225517.3, Sept. 11, 1987, 66 Comp. Gen. _____, 87-2 CPD ¶ 233. Further, although its procurements generally are subject to the requirement for advertising in 41 U.S.C. § 5 (Supp. III 1985), id., the Administrative Office is authorized to contract for court reporting services for the district courts, of which the bankruptcy courts are a unit, without regard to the foregoing statute. 28 U.S.C. § 753(g). In such a case, where the protested procurement is not subject to the procurement statutes, we review the matter to determine whether the actions taken by the agency were reasonable. Gino Morena Enterprises, B-224235, Feb. 5, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 121.

Here, we think that the initial decision to award Newberry's contract for three judges was consistent with the RFP's provisions.

The protester does not argue that the RFP on its face provided for two awards. Rather, it contends that it assumed that two awards would be made because the Administrative Office has in the past divided its requirements for reporting services between two contractors. In response, the agency concedes that multiple awards have been made in the past. The Administrative Office explains, however, that such awards were made only where the offeror first in line for award lacked sufficient personnel to fulfill all of the court's needs. Here, the solicitation specified that a single award would be made for reporting services for three judges and the Administrative Office found that the top-ranked offeror, Newberry, could satisfy the entire requirement. Under the circumstances, we have no basis upon which to object to the Administrative Office's action.

As to whether the Administrative Office reasonably determined that Newberry's offer was more favorable than Superior's, we again note that the RFP provided for the evaluation of offers on the basis of experience, as well as price. The protester does not argue that the agency's consideration of its past performance under the criterion "experience" was improper. It does, however, dispute the Administrative Office characterization of its recent performance as deficient. Superior contends that three of the four instances cited by the Office in which its reporters failed to appear were "inadvertent"--in one instance, the reporter had car trouble; in another, she was mistaken as to the starting time; and in the third, the

reporter arrived late because of severe weather conditions^{1/}--and notes that two of the instances cited occurred after the date of contract award. The Administrative Office did not consider inadvertence as an adequate excuse. While it is true as the protester notes that two of the cited instances occurred after the date of contract award we think that the two instances cited which involved failure to perform in early December 1987 were sufficient to support the Administration Office's selection, while the two later instances serve to confirm the Office's judgment. We do not think that the Administrative Office's conclusion that Superior was not as reliable a contractor as Newberry was unreasonable. In our opinion, it was therefore reasonable and consistent within the RFP terms for the Administrative Office to have selected Newberry for award despite Superior's slightly lower price. Moreover, under the circumstances, we find no reason to object to the Administrative Office's plan to modify Newberry's contract to increase the number of judges for whom reporting services are to be provided.

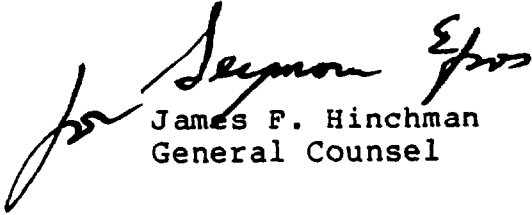
Superior also complains that Newberry should not have been considered for award in the first place since the husband of the firm's president is both an officer of the company and an employee of the Federal Government.

We will not consider this basis of protest since it is untimely. In response to a protest filed with the Administrative Office by Superior contending that award to Newberry would be improper because of the husband of the president's status, the Office informed Superior by letter dated December 29, 1987 that it did not consider that status as an obstacle to award. Superior did not file its protest with our Office until March 1, 1988. Although Superior filed an intervening agency-level protest, it did not raise this issue in it; the agency-level protest thus has no bearing on the timeliness of Superior's raising this issue before our Office. General Microfilm, B-228427.2, Oct. 27, 1987, 87-2 CPD ¶ 405. To be timely, Superior's protest of this issue should have been filed within 10 days of its receipt of the agency's letter of December 29. 4 C.F.R. § 21.2(a)(2) (1988). Instead, it was filed approximately

^{1/} While it appears that there was indeed severe weather the record shows that the judge did arrive and that the hearing was held with a substitute reporter.

2 months later. In view of the above, we do not believe it would be appropriate to consider this matter.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel